LIBRARY
SUPREME COURT, U. S.

FILED
DEC 6 1973
MICHAEL RODAK, JR., CLERK

No. 73-590

In the Supreme Court of the United States

OCTOBER TERM, 1973

PAUL VARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-590

PAUL VARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that certain evidence was erroneously admitted against him in this tax evasion prosecution and that the testimony of a rebuttal witness should have been stricken.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to defraud the United States by impeding the lawful functions of the United States Treasury Department, in violation of 18 U.S.C. 371, and on two counts of wilful filing of false income tax returns for the years 1965 and 1966, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (Pet. App. 2a-3a). Petitioner was sentenced to a total of six years' imprisonment, with possibility of early parole under 18 U.S.C. 4208(a)(7), and fines were imposed totalling $20,000 (Pet. App. 3a). The court of appeals affirmed (Pet. App. 1a-9a).

Petitioner does not challenge the sufficiency of the evidence.[1] It established that the only income reported on his 1965 and 1966 income tax returns was $7,280 in wages each year from Fountainbleu Florists, of which petitioner was president (Tr. 392, 414, 416, 422-423).[2] The evidence also established, through the testimony of an Internal Revenue Service undercover agent and two former "policy" writers, that petitioner was conducting a substantial gambling operation during those years.[3]

1. Petitioner contends that evidence that he was receiving police protection should not have been admitted. The government's evidence concerning police protection was introduced through the testimony of Special Agent Apostolou of the Internal Revenue Service. He stated that, about once a week during the approximately four months that he had petitioner under surveillance, he observed petitioner and one of his co-conspirators emerge from a house which petitioner visited every day and stand on the front lawn for approximately one

---

[1] Contrary to petitioner's argument that the court of appeals characterized the evidence against him to be thin (though sufficient) (Pet. 3), the court in fact stated that, "[w]hile the contacts between these witnesses and Vario were not as extensive as those between the witnesses and Vario's co-conspirators, the evidence as a whole was entirely sufficient to support the jury's verdict and is not here challenged" (Pet. App. 4a).

[2] "Tr." references are to the transcript of trial proceedings.

[3] The undercover agent testified that he made four "lay-off" payments of approximately $140 each in December 1965 (Tr. 48-49, 56-58), and twenty-one "lay-off" payments in January 1966 (Tr. 58-59). One of the former policy writers testified that he laid off bets to petitioner's policy operation in 1965 and 1966. During approximately five weeks in 1966, he laid off about $400 per week (Tr. 125-129, 142). The other policy writer testified that he laid off $210 to $280 per day in 1965 and January of 1966 (Tr. 191-192, 195-198, 209-212).

minute, looking up and down the street (Supp. App. 16, 26).[4] Petitioner's companion carried a brown paper bag. A police car then passed by slowly. A passenger in the police car looked in the direction of the two men. Petitioner and his companion thereupon entered an automobile and drove to a nearby intersection at which the same police car came up behind the vehicle in which petitioner was riding. The two cars then drove off together, with the passenger in the police car looking out its rear window (Supp. App. 26-28).

The decision below correctly recognized (Pet. App. 9a) that this evidence established that petitioner's activities generated sufficient income to enable him to pay the police to provide him with escort protection. It also established the relationship between petitioner and his co-conspirator. While the evidence indicated that petitioner was engaged in bribing policemen, it was also plainly relevant, and hence admissible, with respect to the offenses for which petitioner was charged, *viz.*, failure to report gross income from a "policy" operation and conspiracy to conceal both the existence of the operation and his receipt of gross income from it. *United States* v. *Keilly*, 445 F. 2d 1285, 1288 (C.A. 2), certiorari denied, 406 U.S. 962; *United States* v. *Bozza*, 365 F. 2d 206, 213 (C.A. 2).

2. Petitioner's claim with respect to the district court's failure to strike the testimony of a government rebuttal witness who had been present in the courtroom despite an order excluding witnesses is similarly without merit.

During the presentation of the government's case-in-chief, Fortuna, a Nassau County policeman, testified

---

[4] "Supp. App." refers to the Supplemental Appendix in the court of appeals.

that on August 7, 1965, he was assigned to investigate a burglary at petitioner's residence (Supp. App. 44-46). Fortuna testified that during the investigation petitioner showed him a metal box which was on the floor of a closet in the master bedroom. The box contained three packages of currency (one package had a $1,000 bill on top), and petitioner stated to Fortuna that there was $15,000 in the box (Supp. App. 48-49). Petitioner completely denied Fortuna's testimony (Tr. 465-466; Supp. App. 73-75). The rebuttal witness, Donohue, the Nassau County policeman who had initially responded to the burglary call at petitioner's residence, corroborated Fortuna's testimony (Supp. App. 103-108). On cross-examination, however, Donohue admitted that he had been in the courtroom during Fortuna's testimony, despite a witness exclusion order of the district court. The district court nevertheless denied a motion to strike Donohue's testimony because the government explained that Donohue had not been expected to be used as a witness and that his testimony became necessary only on account of petitioner's denial of Fortuna's testimony (Supp. App. 111-112).

Contrary to petitioner's argument (Pet. 8-9), the district court's refusal to strike Donohue's testimony does not conflict with *Holder* v. *United States,* 150 U.S. 91. There, the Court explicitly recognized that violation of a rule excluding witnesses does not automatically bar the witness from testifying and that the weight of authority was that the witness could not be excluded on that ground alone. The Court noted that the action of a trial court in admitting testimony under such circumstances will not ordinarily be open to revision (150 U.S. at 92). Here, as the court of appeals observed (Pet. App. 7a), the violation of the rule was not intentional, the fact of the violation was made known to the

jury, and the credibility of Donohue was not a crucial element of the government's case. Cf. *United States* v. *Nazzaro*, 472 F. 2d 302, 313, n. 12 (C.A. 2). Under these circumstances, the motion to strike was properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12